

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





77-1101

To be argued by  
Elizabeth M. Fink

ORIGINAL

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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In the Matter of the  
Grand Jury Subpoenas of

MARIA T. CUETO

and

RAISA NEMIKIN,

Appellants.

-----x

77-1101

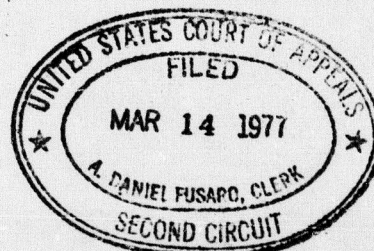
BRIEF FOR APPELLANTS

On Appeal from a Judgment of the United  
States District Court for the  
Southern District of New York

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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|-------------------------|---|
| In the Matter of the    | : |
| Grand Jury Subpoenas of | : |
| MARIA T. CUETO          | : |
| and                     | : |
| RAISA NEMIKIN           | : |

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BRIEF FOR APPELLANTS

QUESTIONS PRESENTED

1. Whether appellants First and Fifth Amendment rights were violated by the in camera submission of ex parte documents to show the nexus between the N.C.H.A. and the F.A.L.N.

(a) Introduction.

(b) Whether the government must show a nexus between the witness called because of membership in an organization and the illegal acts under investigation where substantial First Amendment rights are involved.

(c) Whether appellants raised substantial First Amendment claims.

2. Whether the District Court, in summarily finding appellants in contempt absent any offer of proof, violated their



right to due process under the Fifth Amendment to the United States Constitution.

3. Whether the Court below erred when it failed to make a full investigation into or hold an evidentiary hearing about illegal electronic surveillance of appellants and their attorneys which tainted the subpoenas and the questions propounded to appellants.

4. Whether the Court below erred in not holding a hearing to determine whether the subpoena duces tecum served upon Bishop Milton L. Wood violated appellants' Fourth Amendment rights and thereby tainted the grand jury proceedings.

### PRELIMINARY STATEMENT

This is a consolidated appeal on behalf of Raisa Nemikin and Maria T. Cueto from orders entered on February 26, 1977 and March 5, 1977, respectively, holding appellants in civil contempt pursuant to 28 U.S.C. §1826 and remanding them to the custody of the U.S. Marshall until the term of the grand jury expires on May 8, 1978, or until such time as they testify before the November, 1976 Federal grand jury. Timely Notices of Appeal were filed on February 28, 1977 and March 7, 1977, respectively, Motions for Stays Pending Appeal were denied on March 1, 1977 and March 8, 1977 and on the later date, this Court, during oral argument, agreed to consolidate the two cases for the purposes of this appeal.

### STATEMENT OF FACTS

#### a) The Basis for the Subpoenas

Sometime in November, according to the government, a copy of a letter from an Episcopal Parish in Texas, containing a funding proposal and addressed to Maria T. Cueto, the National Director of the National Commission on Hispanic Affairs of the Protestant Episcopal Church (hereinafter "N.C.H.A.") was allegedly found in an apartment belonging to Carlos Alberto Torres. This letter bore a 1975 date and was presumably in Mr. Torres' possession because he was a Commission member and



as such one of his tasks was responsibility for reviewing the funding proposals submitted to the Commission. According to the government, explosives were found in the apartment and Mr. Torres, now a fugitive, is suspected of being a member of the F.A.L.N.

Thereafter, F.B.I. agents questioned many past and present members of N.C.H.A., including appellants, as well as numerous persons who worked for the Protestant Episcopal Church at its headquarters at 815 Second Avenue in New York City. In addition, the homes of numerous Hispanic persons in Chicago were searched without warrants.

b) The National Commission on Hispanic Affairs

The N.C.H.A. is an official organ of the Protestant Episcopal Church. It was created at the 1970 General Convention of the Church to develop programs to aid in solving the social, economic and spiritual needs of the Hispanic Community within the borders of the United States, so that the Church could better reach out to the Hispanic Community. The N.C.H.A. has stated its goals as follows:

- (1) To continue to stand with the Hispanic people in the search for, and development of, the resources, skills, and alternative criteria, necessary for direct access to, and full participation in, the democratic expression -- of voice, vote, changing, organizing, and directing -- which affects their lives and in which the "Hispano" has little or no participation.
- (2) To continue providing the direction for the strengthening of the ongoing work of the Church among "Hispanos" by assisting, supporting and stimulating the Church to continue to reaffirm

its mission, keeping a proper balance between the sociological needs and theological objectives.

Members of the Commission represent regions of the country where there is a high concentration of Spanish-speaking peoples. According to the Commission their members have "one ingredient in common -- a keen understanding of the needs of the Hispanic community and the role the Church must play in alleviating the oppression and the exploitation of the forgotten." The Commission concentrates on initiating and developing "effective programs in self-determination for the 'Hispanic people'." The ten to fifteen members receive no pay and their function is to screen, review, develop and implement church programs to be implemented in the Hispanic community.

The N.C.H.A. has helped to develop programs in the South Bronx and East Los Angeles. From St. Ann's in the Bronx have come "organizers to lead the community struggle against landlords who have attempted to burn people out in order to collect insurance and sell the land for an industrial park." In Los Angeles there had been an "effort to stop the destruction of homes and the dislocation of thousands of Chicanos from their barrio."

Although the N.C.H.A. is primarily a program agency, they have awarded grants. For example, they helped a cooperative in New Mexico by contributing land, funded a cultural center and alternative high school in Wisconsin, an alternative high school in Chicago, a bilingual communications center in Seattle, and appealed for aid for earthquake-ravaged Guatemala.



Members of the Commission and its full time staff function as lay ministers. It is their responsibility to bring the Church to the Hispanic Community and to bring that community closer to the Church. They are missionaries with special knowledge of the spiritual needs of the Hispanic peoples. The N.C.H.A. also began a theological development task force with the objective to "design and develop pastoral strategies and outreach in order to introduce the Episcopal Church to the Hispanic Community." The strategies are meant to "allow for a realistic approach to the maximum involvement of the Spanish-speaking people in the life of the Church."

c) Appellants

Maria T. Cueto, appellant herein, was the National Director of the N.C.H.A.; and Raisa Nemikin, also appellant herein, was her secretary. Ms. Cueto has worked within the Protestant Episcopal Church for the last eleven (11) years. In 1966, she was called by Father Luce to work for the Parish of East Los Angeles. There she carried out a program aimed at resolving issues such as police brutality, welfare rights and housing discrimination, that had plagued the Parish. Bishop Bloy, the Bishop of the Diocese of Los Angeles instructed Maria in using Christian doctrine as the basis for attacking social injustice. Ms. Cueto worked in this program for three years, after which she returned home to Phoenix, Arizona, where she worked for the Protestant Episcopal Church as a youth counselor and teacher.

In 1971, she became the N.C.H.A. representative from Arizona. After serving on the Commission for one year, Presiding Bishop Hines and Bishop Blanchard, Vice-President of the Episcopal Church, asked her to come to New York to become the National Director of the Commission, or as it is also known, Hispanic Officer for the Domestic and Foreign Missionary Society of the Episcopal Church.

As a lay person Ms. Cueto participated in carrying out the corporate ministry of the Church and in taking Christ's message to Hispanic people. Upon expiration of her tenure with the N.C.H.A., Ms. Cueto became Associate Director of the Coalition for Human Needs, the umbrella agency for the ethnic and minority projects of which the N.C.H.A. is but one.

Since 1972, appellant, Ms. Nemikin, has worked as the bi-lingual secretary for the National Commission on Hispanic Affairs.

d) Procedural History

On November 18, 1976, the F.B.I. arrived at the Episcopal Church Center in New York and spoke to both Bishop Martin and Bishop Wood. Appellants were called in to the Bishop's office to talk to the F.B.I. The agents informed them that they were looking for a fugitive whose name was Carlos Alberto Torres. Torres, they said, came from Chicago where his apartment had been raided and explosives were found. The F.B.I. agents informed those present that a "letterhead" from



the Episcopal Church had been found in the apartment. Appellants were shown numerous photographs which they were asked to identify and the assembled group was told in detail of injuries and damage caused by explosives, including those at the Fraunces Tavern bombing in New York. Appellants told the agents that they had not seen Torres since October 26, 1976, when he had visited their offices, and that they did not know his whereabouts. Special Agent Henry Garcia asked Cueto to call him if she heard from Torres.

On the following day appellants, who were then in Puerto Rico for a meeting, were approached by two agents as they were arriving at a social given by the Diocese of Puerto Rico. Appellants told the agents that "this was not time to ask questions" and complained of the harassment. The agents left, but not without upsetting the evening's festivities. Apparently, the Bishop of Puerto Rico had already been questioned about the appellants.

Once again on November 22, 1976 appellants were visited by the F.B.I. at the Episcopal Church Center. These agents apologized for the appearance of agents at the Diocese in Puerto Rico. After asking questions of appellants in a public area of the offices, one of the agents told Ms. Cueto: "If you don't cooperate with us, you will be called before a grand jury and things will be very bad for you."

A few days later, although appellants did not find out about it until considerable time had passed, a subpoena



was served upon Bishop Wood at the Episcopal Church Center. This subpoena called for samples of typewriting from every machine in the office, all documents relating to the use of Gestetner machines and "any and all records, documents and files within your care, custody or control, or possession relating to Maria Cueto and Raisa Nemikin, including personnel files...." (emphasis supplied) was complied with by the Bishop without consultation with an attorney and without informing appellants. The method of compliance followed was the one suggested on the subpoena. The mater. l. was turned over to the F.B.I. (The subpoena is attached hereto as appendix "C".)

On Friday, January 7, 1977, appellants were served with grand jury subpoenas -- Ms. Cueto's commanding her to appear on Monday the 10th and Ms. Nemikin's requiring appearance on the 14th. Ms. Cueto called Thomas E. Engel, the Assistant United States Attorney whose name appeared at the bottom of her subpoena, and explained that the weekend was at hand and she needed a few days to secure an attorney. Engel told her to come in Monday and he would see about adjourning the matter.

On Monday morning Ms. Cueto went into the grand jury room to explain to the grand jurors and Mr. Engel that she needed time to secure an attorney. Engel insisted that she be sworn. Ms. Cueto refused saying she wanted to have an attorney. Engel then escorted Ms. Cueto in to see Judge MacMahon, the United States District Judge who was sitting in the Motion



Part. The Judge ordered Ms. Cueto to be sworn, even though she was not represented by counsel; Ms. Cueto refused. She was held in summary contempt and incarcerated in the Metropolitan Correctional Center. When her friends got in touch with Elizabeth M. Fink, who now represents appellants, and asked her to help, Ms. Fink went to visit Ms. Cueto at the Metropolitan Correctional Center and scheduled an emergency Order to Show Cause on the contempt before Judge MacMahon for late that afternoon. However, by the time Ms. Fink arrived at the Court House, the Judge had gone home for the day. Ms. Fink went to see Judge Carter; however, as a co-equal judge, he was not prepared to overrule Judge MacMahon and order a stay. Numerous members of the New York Bar were informed about what had transpired and became very upset at the precipitous nature of the events that led to Ms. Cueto's incarceration. However, they were unable to secure her release by means of numerous telephone calls to this Court.

On the following day, Ms. Fink entered into a stipulation with the Assistant United States Attorney Engel in order to secure Ms. Cueto's release. The stipulation said that Ms. Cueto could be sworn before a grand jury that day (it was not to be the same grand jury as she had been called to a special grand jury that was not sitting on that day) and the taking of the oath would not waive any rights Ms. Cueto would have to make motions to quash her subpoena.



Prior to her release Ms. Cueto was served with a subpoena duces tecum asking for production of the following:

Any and all records, documents, reports, notes, lists, memoranda, statements, books, papers and things in your care, custody, possession or control which relate to, concern, or reflect, for the years 1970 up to and including 1977; (1) the membership of the National Commission for Hispanic Affairs (the "Commission"); (2) financial statements of the Commission, including, but not limited to, statements showing expenses, salaries, income, gifts and sources thereof; (3) names and addresses of all personnel employed by the Commission; (4) a list of all meetings, conferences, and convocations sponsored in whole or in part by the Commission; and (5) names and addresses of all persons attending said meetings, conferences, and convocations.

This subpoena (attached hereto as appendix "D"), as well as the subpoenas to Maria Cueto and Raisa Nemikin, were then adjourned by the Assistant until January 19, 1977 and then subsequently until January 28, 1977. In a letter dated January 20, Mr. Engel informed appellants that he was withdrawing the above subpoena, apparently because it was complied with by the Church, before appellants could challenge it.

On January 26, 1977, appellants filed a Motion to Quash their subpoenas asserting as the grounds therefore, inter alia, that the subpoenas violated the appellants' First Amendment rights to religious freedom and freedom of association, that they were an abuse of the grand jury process, had a "chilling effect" on the Constitutional rights of others and were the result of violations of appellants' Fourth Amendment rights. Appellants also filed a Motion for Production



of Records of Prior Interviews with the F.B.I., and a Motion to Suppress the subpoena to Bishop Wood. (Attached hereto as Appendix "E")

The government, as part of its papers in opposition, submitted to the District Court certain in camera, ex parte documents purporting to establish the "nexus" between the testimony desired from appellants and the investigation being conducted by the grand jury. These documents consisted of an affidavit of the Assistant United States Attorney and the grand jury testimony of an F.B.I. agent. Appellants objected to the use of secret, ex parte materials to defeat their contentions in their Motion to Quash. The District Court upheld the secrecy of the documents and on February 4, 1977, the Court, in a written opinion by Judge Pierce, denied appellants' Motion to Quash the subpoenas, Motion to Suppress the subpoena duces tecum issued to Bishop Milton Wood and appellants' Motion for the Production of Prior Statements made to the F.B.I. (The opinion and order are attached hereto as Appendix "D".)

The District Court ruled that the N.C.H.A. was a social work agency, and also since no priest-penitent privilege was asserted "no burden was placed by the government on the free exercise of religious rights." The Court found on the basis of the ex parte, in camera material submitted by the government as well as appellants' own affidavits that the



investigation was proper and did not interfere with associational rights. Further it found that there was no abuse of the grand jury process.

Appellants appeared before the grand jury on February 14, 1977 and refused to answer the questions propounded to them on constitutional and statutory grounds.

On February 18, 1977 the government made an application to grant use immunity under 18 U.S.C. §§ 6002, 6003 to appellant Nemikin. Said application was granted on February 18, 1977. Appellant Nemikin was recalled before the grand jury the same day and again refused to testify citing constitutional and statutory grounds. The following questions were propounded to her:

- (1) When did you last speak or otherwise communicate with Carlos Torres?
- (2) Please identify all funds, monies of the National Commission on Hispanic Affairs to the Protestant Episcopal Church of the United States, which were directed, openly or in secret, to the F.A.L.N., in whole or in part, indirectly or directly, and I include in that question all monies which were directed to any member of the F.A.L.N.?
- (3) Please identify to the grand jury any person whom you know are involved or have claimed responsibility for the dynamite bombing of Fraunces Tavern on January 24, 1975, resulting in the death of four (4) persons.

The government then applied to the Court for a finding of contempt. The District Court set the contempt hearing for February 23, 1977. On that day appellant Nemikin filed



an electronic surveillance motion. The proceeding was adjourned until February 24, 1977. (See Appendix "F").

On February 24, 1977, appellant Nemikin appeared at the contempt proceeding and sought evidentiary hearings in order to establish just cause under 18 U.S.C. § 26(a). Such hearings were denied. The government submitted two affidavits, one from Assistant United States Attorney Engel and the other from an F.B.I. agent. The affidavits were based on hearsay information and an incomplete search of surveillance records and denied surveillance of appellant Nemikin and her attorneys. The District Court gave the government until the 26th of February, 1977, to conduct a more extensive search of F.B.I. records regarding electronic surveillance.

On February 26, 1977, the District Court accepted three additional denials of surveillance of Ms. Nemikin and her attorneys and held her in contempt. Prior to being held in contempt, appellant was not permitted to call witnesses and no adversary hearing was held on the question of "just cause." District Judge Frankel relied on the opinion of District Judge Pierce on the Motion to Quash.

Moreover, in order to prove the contempt the government merely presented a copy of the transcript of the grand jury proceedings to the Court. No copy was given to the witness until after she was held in contempt.

Appellant was given until 10 o'clock a.m. on February 28, 1977 to purge herself of contempt and testify before the grand jury. At the same time the District Court stayed the order of incarceration until 2 o'clock p.m. in order to allow counsel for Ms. Nemikin to apply to this Court for a stay and/or bail pending appeal.

On February 28, 1977, an application for a stay of execution of judgment or bail pending appeal was made to this Court. Oral argument was heard and a stay was granted until 10 o'clock a.m. on March 1, 1977 at which time the stay was denied. Ms. Nemikin surrendered herself to U.S. Marshalls that same day and is presently incarcerated at the Metropolitan Correctional Center.

As for appellant Maria T. Cueto, the government, on March 4, 1977, made an application to the District Court to grant appellant use immunity pursuant to 18 U.S.C. §§ 6002, 6003. The application was granted by Judge Marvin E. Frankel on the same day. Following the grant of immunity, Ms. Cueto was recalled before the grand jury and again refused to answer the questions propounded to her on constitutional and statutory grounds. The questions propounded to Ms. Cueto were as follows:



- (1) Do you have any knowledge now about the whereabouts of Carlos Alberto Torres?
- (2) Did Carlos Alberto Torres play any role in the bombing of Fraunces Tavern here in New York on January 24, 1975?
- (3) Can you tell us the names of any persons who participated in that bombing or do you have any information at all with respect to it?

On that same day, the government made an oral application to the Court to hold appellant Cueto in contempt and filed substantially the same affidavits denying electronic surveillance as it did for Ms. Nemikin. The District Court, stating that it had decided the legal issues raised in Ms. Cueto's case the previous week in the Matter of Raisa Nemikin, and agreed only to receive any papers adding new or different facts the same day. The proceedings were continued until the following day, March 5, 1977. The District Court also deemed that all papers filed in the Matter of Raisa Nemikin would be considered filed for Ms. Cueto. On March 4, 1977, Ms. Cueto filed an additional affidavit outlining her history within the Protestant Episcopal Church.

On March 5, 1977, appellant Cueto was held in contempt. As was the case with appellant Nemikin, no adversary hearing was held as to the allegations raised to show "just cause." The proof of Ms. Cueto's contempt was based on the unsworn statement of the Assistant United States Attorney that Ms.

Cueto refused to testify. Over the objection of appellant, no transcript or court reporter was presented to fulfill the government's burden to prove the contempt. The District Court stayed the order of incarceration until 2 o'clock p.m. on March 6, 1977, in order to allow counsel for Ms. Cueto to apply to the Court of Appeals for a stay and/or bail pending appeal.

This Court heard argument on appellants motion for a stay or bail pending Ms. Cueto's appeal on March 8th. Said motion was denied. However, the Court agreed to the consolidation of the witnesses' cases on appeal.



POINT I

APPELLANTS' FIRST AND FIFTH  
AMENDMENT RIGHTS WERE VIOLATED  
BY THE IN CAMERA SUBMISSION OF  
EX PARTE DOCUMENTS TO SHOW THE  
NEXUS BETWEEN THE N.C.H.A. AND  
THE F.A.L.N.

a) Introduction

During the first contempt proceedings for Ms. Nemikin, Judge Frankel said he had read Judge Pierce's opinion denying appellants' Motion to Quash, and that unless appellants had something new to add and since he felt that the opinion was well reasoned and correct, he would rely on Judge Pierce's findings. Although Judge Frankel said his decision holding appellants in contempt was not based on the in camera ex parte documents, his statement is controverted by his reliance on Judge Pierce's ruling which stated:

The Court has reviewed certain grand jury materials in camera, as was previously announced, and is compelled to conclude that the actions of the government in this investigation seeks to place no restraint upon what respondents choose to believe in their religion or their politics.

[Transcript of proceedings before  
Judge Pierce, February 4, 1977,  
at p. 46]

It was, in fact, with these ex parte, in camera documents that the government showed the "nexus" and "compelling state interest" required where substantial constitu-

tional protections are raised by a witness to a grand jury.

In the contempt hearing before Judge Frankel appellants argued that whereas ex parte, in camera materials might conceivably be held proper in a hearing on a Motion to Quash, the position of a witness at a contempt hearing was one that brought into play certain additional due process rights and it was a denial of due process to fail to give appellants access to these materials. At the contempt stage, where the witness faces fourteen months in prison, no such non-adversary proceeding can be permitted. United States v. Dinsio, 468 F.2d 1392 (9th Cir. 1972); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972); Chernekoff v. United States, 219 F.2d 721 (9th Cir. 1955); United States v. Coplon, 185 F.2d 629, 639 (2nd Cir. 1950); Alderman v. United States, 394 U.S. 165, 183-4, reh. den. 394 U.S. 939; Dennis v. United States, 384 U.S. 855, 873-875 (1966). (For a fuller discussion of the scope of due process rights at a contempt hearing see Point II, infra.)

These cases show that the government cannot force the witness, when she is facing fourteen months in jail, into the status of "a blind man striking at an invisible foe," Chernekoff, supra, at 724. The United States Attorney cannot be allowed to create the required nexus by "recourse to what he suppresses," U.S. v. Coplon, supra at 638.

To deny adversary hearing in a contempt proceeding totally deprives the witness of due process of law. At the



very least, in camera adversarial proceedings should have been employed.

- b) The government must show a nexus between the witness called because of membership in an organization and the illegal acts under investigation where substantial First Amendment rights are involved.

On the Motion to Quash and, again in the contempt proceedings, the government submitted certain documents in camera, ex parte, in order to supply the "nexus" or "foundation" between the N.C.H.A. and the subject of the investigation, the F.A.L.N. This nexus "is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation the information sought and a subject of overriding and compelling State interest," Gibson v. Florida Investigating Committee, 372 U.S. 539, 546. In Gibson, the question was whether a nexus existed between the N.A.A.C.P. and communist activities; in the instant case the question is whether the nexus exists between the N.C.H.A. and the F.A.L.N.

The witness vigorously objected to the in camera non-adversary showing on the Motion to Quash and at the contempt hearing. However, Judge Pierce, overruling the witness's objection and proceeding in a non-adversary manner, found that the submission indicated "that the pattern is indeed one which may connect several other persons to the activities under investigation." (p.12)

c) Appellants raised substantial First Amendment claims.

The law is well settled that constitutional guarantees are applicable to grand juries. As the Supreme Court noted in Branzburg v. Hayes:

Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth. 408 U.S. 665, 708 (1972)

Where witnesses raise the protection of the First Amendment, courts must apply the same rigorous standards that apply in other areas of judicial review.

There are differences between grand jury investigations and other forms of governmental activity to which the First Amendment has been applied, but none of the differences provides any basis for applying the First Amendment less rigorously to grand jury proceedings. Bursey v. U.S., 466 F.2d 1059 (9th Cir. 1972)

Appellants, in the instant case, have asserted substantial First Amendment considerations.

Ms. Cueto and Ms. Nemikin both serve as lay ministers with the Protestant Episcopal Church, as the National Director of the N.C.H.A. and her bilingual secretary, respectively. The N.C.H.A. is an official agency of the Church, working under the auspices of the Domestic and Foreign Missionary Society. The N.C.H.A. was created to bring the Christian mission of the Church to the Hispanic people by serving their spiritual, as well as their social and economic needs. In ruling on



appellants' Motion to Quash the subpoenas, Judge Pierce ruled that appellants were, in fact, merely "social workers" operating in "affiliation" with the Protestant Episcopal Church. The appellants were denied a full adversary hearing to present their First Amendment claims. Affidavits supplied to the Court on behalf of appellants placed a burden on the government to show both a "compelling interest" in and a nexus between the witnesses and the subject matter of the investigation.

In support of the motion on behalf of the Episcopal Diocese of New York to intervene on behalf of the appellants on the Motion to Quash, the Right Reverend Paul Moore, Jr. stated in his affidavit:

...As spiritual head of the Diocese, it is my episcopal duty to minister to the needs of this [Hispanic] population. In furtherance of this ministry, I work closely with the National Commission for Hispanic Affairs ("The Hispanic Commission") ... and I view the Hispanic Commission an integral part of my ministry. In furtherance of this ministry, I often write or otherwise communicate with the Hispanic Commission. I view these communications as confidential.

...In dealing with the Hispanic Commission, I of necessity must and do work with these two women [appellants herein], and I view them as integral aides in my ministry. In order for this relationship to remain useful to my ministry, it is absolutely necessary that the relationship remain confidential.

During the course of the contempt proceedings for appellants, Judge Frankel accepted as true, and was uncontroverted by the government, affidavits from Reverend John Stevens, an ordained minister of the Episcopal Church, and Carman Hunter, a lay minister of twenty-eight (28) years and the appellants'



former supervisor. They supported the appellants' claim of religious freedom as lay ministers.

The courts have firmly protected these First Amendment rights from government interference.

The Religion Clauses has specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (Emphasis supplied)

(See also, Sherbert v. Verner, 374 U.S. 390 (1963); Presbyterian Church v. Hull Church, 393 U.S. 440 (1969); Reynolds v. United States, 98 U.S. 145 (1897); Cantwell v. Connecticut, 310 U.S. 296 (1940).

Judge Pierce's finding of appellants as "social workers" and the N.C.H.A. as a "social work agency" is not only erroneous, but in itself violates the separation doctrine. The very essence of the First Amendment is to prohibit the government from playing a role or inhibiting questions of religious doctrine, mission, ministry, etc. In Presbyterian Church v. Hull Church, supra, at 448, the Supreme Court spoke as to the meaning of religious freedom, independent of governmental interference.

...a spirit of freedom for religious organizations,



an independence from secular control or manipulation--in short, power to decide for themselves, free from state interference, matters of Church government as well as those of faith and doctrine.

(See also, Serbian Eastern Orthodox Diocese, etc. v. Millvojevich, 96 S.Ct. 2372 (1976); Maryland and Virginia Churches v. Sharpsberg Church, 396 U.S. 367 (1970); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960); Watson v. Jones, 13 Wall 679, 20 L.Ed. 666 (1872).

Clearly, Judge Pierce's finding as to appellants' First Amendment guarantees of religious freedom were erroneous. The government, in only presenting a non-adversary submission of documents, did not meet their burden to show a compelling interest, sufficient to overcome appellants' constitutional rights. (See Point I (a), supra)

Along with guarantees of religious freedom, appellants have asserted that their First Amendment associational rights were violated, and thus there was "just cause," pursuant to statute, for their refusal to answer questions put to them before the grand jury.

It is clear that both Ms. Cueto and Ms. Nemikin were subpoenaed in their capacity as officers and members of the N.C.H.A. This point is well exemplified in that their relationship to this investigation stems from Mr. Torres' membership in the N.C.H.A. The courts have consistently held

that when First Amendment associational rights are asserted the government must come forward to show a sufficient "nexus" between the organization being subpoenaed (here, the N.C.H.A.) and the subject of the investigation (in the instant case, the F.A.L.N.). N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); Bates v. Little Rock, 361 U.S. 516 (1960); Shelton v. Tucker, 364 U.S. 479 (1960); N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Gremillon v. N.A.A.C.P., 366 U.S. 293 (1961); Schneider v. State, 308 U.S. 147 (1939).

The government has not showed a sufficient nexus between the N.C.H.A. and the F.A.L.N. to override appellants' associational rights as required under Gibson. Judge Pierce and Judge Frankel, in his reliance on the previous decision, erred in accepting ex parte, in camera documents to sustain the government's burden.



## POINT II

THE DISTRICT COURT, IN SUMMARILY FINDING APPELLANTS IN CONTEMPT, ABSENT ANY OFFER OF PROOF, VIOLATED THEIR RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Appellants were adjudged in contempt as recalcitrant witnesses in violation of 28 U.S.C. §1826(a).

In Harris v. United States, 382 U.S. 162 (1965), the Supreme Court, in reversing a decision of this Court, ruled that a refusal to testify before a grand jury based on the invocation of constitutional objections should be adjudicated using the due process safeguards provided by Rule 42(b) of the Federal Rules of Criminal Procedure.

In Harris, and apparently in the case at bar, the lower court found the witnesses in contempt under the summary procedures set forth in Rule 42(a). Stating this to be error, the Court reasoned that, under Brown v. United States, 359 U.S. 41, 54 (1959) (Dissenting Opinion) and in the interests of due process, Rule 42 (a) should be reserved "for exceptional circumstances," such as acts threatening a judge or disrupting a hearing or obstructing court proceedings. In any event, the Court concluded:

...In light of the concern long demonstrated by both Congress and this Court over the possible abuse of the contempt power, ibid, and in light of the wording of the Rule, summary contempt is for 'misbehavior' (Ex Parte Terry, 128 U.S. 289. 314 (1888)) in the 'actual presence of the Court.' Then speedy punishment may be necessary to achieve summary vindication of the court's dignity and authority. But swiftness was not a prerequisite of justice here. Delay necessary for a hearing would not imperil the grand jury proceedings.

The alleged contempt raised in the instant case did



not occur in the presence of the District Court. This fact cannot be altered or remedied by repeating the objectionable questions to the witness before the court below.

The real contempt, if such there was, was contempt before the grand jury--the refusal to answer to it when directed by the court. Swearing the witness and repeating the questions before the judge was an effort to have the refusal to testify 'committed in the actual presence of the court' for the purposes of Rule 42.

It served no other purpose, for the witness had been adamant and had made his position known. The appearance before the District Court was not a new and different proceeding unrelated to the other. It was ancillary to the grand jury proceeding and designed as an aid to it.... In the instant case, the dignity of the court was not being affronted: no disturbance had to be quelled, no insolent tactics had to be stopped. The contempt here committed was far outside the narrow category envisioned by Rule 42 (a).

Harris, supra, at p. 164-165.

Appellants, herein, had at all times and in all respects approached the proceedings with complete respect and exemplary behavior. There have been no allegation made, nor can any implication be drawn from anything in the record, that any conduct engaged in by appellants was disruptive or insolent. In such a case, the mandate of Harris is clear.

While Harris was decided prior to the enactment of §1826(a), subsequent decisions of the Supreme Court have made it clear that the purpose of its enactment was to codify existing procedures. See Gelbard v. U.S., 408 U.S. 42-43, n.1 (1971); Shillitani v. United States, 384 U.S. 364 (1966); Sen Rep No. 91-617, pp. 33, 56-57, 148-149 (1969). Shillitani further supports this position since the Court, in ruling on



the due process requirements which must be afforded an individual who refuses to testify before a grand jury, held that the safeguards of indictment and jury trial are not necessary, but approved of these §1826(a) civil contempt proceedings being brought under Rule 42 (b). In United States v. Alter, 482 F.2d 1016 (9th Cir., 1973), after recognizing that the Supreme Court had acknowledged the impossibility of drawing a straight and definitive line between civil and criminal proceedings, the Ninth Circuit held that:

Following the teaching of the Supreme Court drawn from this mosaic of cases, we conclude that a proceeding in contempt to compel a federal grand jury witness to testify is civil enough to foreclose his claim that he has a constitutional right to trial by jury (Shillitani) and criminal enough to require the application of Rule 42(b) (Harris), a conclusion we reached less elaborately in United States v. Dinsio, 468 F. 2d. 1392 (9th Cir., 1972).

It follows, therefore, that Alter was entitled to notice prescribed by Rule 42(b) and to a reasonable time to prepare his defense, i.e., to show 'just cause' for refusing to respond.

at p. 1022-1023.

While the propriety of the application of Rule 42(b) to situations such as presented here is not settled in this Circuit, compare United States v. Handler, 476 F.2d. 709 (2nd Cir., 1973) and United States v. Sadin, 509 F. 2d 1252 (2nd Cir., 1975) with In re Persico, 491 F. 2d 1156 (2nd Cir., 1974), appellants urge that the better-reasoned position is that of Handler and Sadin:

[W]e hold that in a civil contempt proceeding pursuant to 28U.S.C. §1826 where, after a grant of immunity, a witness before the Grand Jury persists in his refusal to testify, he is basically entitled to the "procedural regularities" prescribed by Rule 42(b).

Sadin, supra, at p. 1255



and that this question was finally settled in United States Wilson, 421 U.S. 309 (1975).

In Wilson, this Court held that where a witness, during a trial, refused to answer questions after the granting of immunity, the use of summary contempt was improper and that the case should be remanded for proceedings in accordance with Rule 42(b). In reversing and holding that the use of summary contempt under Rule 42(a) was proper in cases involving in-court contempt, the Supreme Court upheld the principle under Harris that the less summary procedures of Rule 42(b) should be applied to a civil contempt proceeding of a recalcitrant witness before a grand jury.

It is the duty of this Court to assure that appellants are afforded their constitutional right to due process. At a bare minimum, these include the safeguards set forth in Rule 42(b)---a hearing on notice with reasonable time to prepare a defense and a statement of the essential facts constituting the criminal contempt charged. This much, and more, has been held to be the applicable constitutional standard where less significant rights than personal liberty are involved or where far more pressing action is required.

Thus, in Goldberg v. Kelly, 397 U.S. 254 (1970), the Court held that where a welfare recipient faced the possibility of termination of benefits, the aggrieved party must be afforded full administrative review following timely and adequate notice detailing the reasons for the proposed termination, together with an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evi-



dence crally. Similarly, in Morrissey v. Brewer, 408 U.S. 471 (1972), the Court held that before a parolee could have his parole revoked by the parole board, a preliminary hearing must be held upon adequate notice to determine whether there was probable cause to believe that the alleged parole violation had occurred. This hearing must include a statement of the alleged violation, the right to prepare and present evidence and the right to cross-examine persons who have given adverse evidence.

Appellants urge that no fewer safeguards can be afforded to them. They stand to be deprived of their liberty, a loss far greater than that involved in Goldberg v. Kelly, supra, and yet they have been deprived of the opportunity to even read the grand jury transcript of their testimony, the very basis of the proceedings against them, so that they could prepare a defense. Likewise, no testimony or other evidence of their actions before the grand jury was presented in open court. The foreman or stenographer of the grand jury was not even called to testify what had transpired. The only 'evidence' presented was the unsworn statement of the Assistant United States Attorney, hardly an unbiased party and one not dissimilar to a judge who would be disqualified from presiding over a contempt hearing under Rule 42(b) or a parole officer who would not be permitted to conduct a revocation hearing under Morrissey.<sup>\*</sup> Further, unlike Morrissey, neither appellant here

\*Appellant Nemikin was given a copy of her grand jury testimony immediately after being found in contempt, together with a statement to the effect of "You see, it wouldn't have helped you anyway." Appellant Cueto has not yet been permitted to see her grand jury testimony, having been told that since it wouldn't

has even been arrested, charged with or convicted of a crime. Thus, the need to proceed with all deliberate speed can hardly be more persuasive here than in Morrissey, where the due process requirement of a preliminary hearing overcame the need to speedily resolve the issue of continued illegal behavior by persons adjudged to be criminals.

Petitioners urge that this Court's interpretation of Harris in United States v. Sadin, supra, United States v. Wilson, supra, and United States v. Mara, 482 F. 2d 1196 (2nd Cir., 1973) sets forth the proper standards and procedures to be followed and that this proceeding be remanded for proceedings in accordance with Rule 42(b) to explore possible exculpatory or mitigatory circumstances, Mara, and to permit appellants to examine their grand jury testimony so as to prepare their defenses and to permit them the opportunity to confront any person presenting evidence against them in a full adversary proceeding.

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have been of any assistance to Appellant Nemikin, it wouldn't be of any assistance to her either.



POINT III

THE COURT BELOW ERRED WHEN IT FAILED  
TO MAKE A FULL INVESTIGATION INTO OR  
HOLD AN EVIDENTIARY HEARING ABOUT  
ILLEGAL ELECTRONIC SURVEILLANCE OF  
APPELLANTS AND THEIR ATTORNEYS WHICH  
TAINTED THE SUBPOENAS AND THE QUESTIONS  
PROPOUNDED TO APPELLANTS.

Appellants alleged electronic surveillance against themselves and their attorneys. These allegations were not only general ones, but also included a specific allegation of electronic surveillance of the telephone in the home of appellants' attorney, Ms. Fink, in the form of affidavits from herself and Amy Lobenstein. Ms. Lobenstein's affidavit stated that she had recalled Ms. Fink's number immediately after her original conversation and heard a replay of the last part of her original conversation. Ms. Fink's affidavit stated that there had been many suspicious sounds on her phone and that there had been men, without authorization, digging with no discernible purpose in front of her house.

The government's response was general, there was no proper investigation of the Lobenstein affidavit. The denial was also insufficient in that the check for electronic surveillance included hearsay affidavits made by persons who had not conducted the search. This is true in the check of the Chicago and National Offices of the F.B.I. in the check made

for appellant Nemikin; in the National Office check made for appellant Cueto; and, in the check made of attorneys in Chicago, New York and Washington. There was also only a hearsay denial of surveillance on the Episcopal Church Center phone which was appellants' business phone.

Moreover, no checks were made of any other agencies, or any logs or of any F.B.I. subject matter files. In addition, no check was made of New York City Police files in order to determine whether there was illegal surveillance of appellants or their attorneys. This is a highly significant omission because the investigation of the F.A.L.N. Fraunces Tavern incident is clearly being jointly conducted by the F.B.I. and local authorities.

Furthermore, appellants went well beyond their burden and stated how it was possible for the questions to have been tainted by illegal electronic surveillance. They showed that the government had otherwise insufficient information to subpoena the specific N.C.H.A. records which the government asserts were the basis for the questions propounded.

The question about funds supplied by the National Commission on Hispanic Affairs was obviously a product of the information generated by the subpoenas served upon Bishop Milton L. Wood and Bishop John M. Allin.

[p. 6 government's Memorandum of Law in support of its motion that Raisa Nemikin be held in contempt.]

Thus it is appellants' contention that the questions propounded to them were tainted by illegal electronic surveillance.



How else would the government have known which specific files of the N.C.H.A. to subpoena when their only piece of evidence was a funding proposal from an Episcopal Church in Texas. This allegation of illegal electronic surveillance was never denied by the government.<sup>\*/</sup>

Not addressing himself to the above allegation of illegal wiretap, Judge Frankel felt that the search conducted by the government was sufficient because he said the questions could have been asked by any informed newspaper reader. This reasoning does not take into account the period of time of the issuance of the subpoenas and the preparation of the questions asked. Clearly, it was done before the incident became newsworthy. Furthermore, without any information from the government and without an adversary proceeding (Alderman v. United States, 394 U.S. 165 (1969)), there was no way to determine whether "the fruits of any electronic surveillance" tainted these subpoenas.

It is beyond dispute that the use of illegal electronic surveillance by the government constitutes "just cause" under §1826(a) to refuse to answer grand jury questions. Gelbard v. U.S., 408 U.S. 41 (1972). It is also the law of this Court

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<sup>\*/</sup> The Assistant United States Attorney asserted that he had no knowledge of electronic surveillance and that his questions were based on the subpoenaed documents. Clearly he may not know of electronic surveillance that served as the basis for the subpoena.

that a specific allegation of illegal wiretapping places a burden upon the government to deny such allegation. U.S. v. Toscanino, 500 F.2d 267, 281 (2nd Cir. 1974) The question remains what constitutes a specific allegation and what constitutes a sufficient denial.

In United States v. Alter, 482 F.2d 1016, 1026 (9th Cir. 1973), the Ninth Circuit established a five pronged test to determine the sufficiency of attorney surveillance allegations. Appellants herein fulfilled this test and therefore were entitled to specific denials of illegal electronic surveillance, rather than the general, conclusory denials the government provided. In fact, in Alter, the Court held a broader search than made herein insufficient.

The government will cite U.S. v. Grusse, 515 F.2d 157 (2nd Cir. 1975) for the proposition that their denials were sufficient. In Grusse, the government presented testimony, subject to cross-examination by appellants' counsel, to deny any illegal wiretap and there was no specific allegation of a connection between any surveillance and the questions propounded to the appellants. In the instant case, there was no opportunity to cross-examine anyone as to illegal wiretap and there was a very specific showing of how illegal wiretap could have tainted the questions asked.

Appellants must be given the meaningful opportunity to which they are entitled to test the legal and factual sufficiency of the government's contentions. U.S. v. Alter,



supra, at 1027, n. 19. Indeed, because factual allegations will be at issue, and in light of the history of haphazard recordkeeping of electronic surveillance by the government, only a full hearing can resolve the contradictory claims. At the least, the government must testify under oath, subject to cross-examination, and must check with every local, state and federal government agency that had any connection with the investigation. In re Tierney, 465 F.2d 806, 812 (5th Cir. 1972); Elhias v. United States, 364 U.S. 206 (1960); U.S. v. Grusse, supra.

The substance of the government's inquiries and the replies which it receives must be set forth with specificity. Inquiries must be made in regard to each name, address and phone number. "Nor does the affidavit reveal the dates of claimed surveillance to which the inquiries were addressed." U.S. v. Alter, supra, at 1027. There must be ample indication that a search of files was conducted by officials for every agency to which an inquiry must be made. This is imperative because "[i]f any of the conclusions in the affidavit were later proved wrong, it would virtually be impossible to establish that the affidavit was perjured." Ibid. at 1025. Furthermore, the response from each government agency must establish that their search was exhaustive.

The adequacy of the government's response must be calibrated within the historical context of inadequate government denials of surveillance. Indeed, the government's track



record as to the veracity of its affidavits regarding electronic surveillance along requires and evidentiary hearing.<sup>\*/</sup> Affidavits are often submitted to the trial court purporting to deny surveillance and only on appeal, often in the Supreme Court, does the fact of surveillance emerge. For example, only in the petition opposing rehearing in Alderman, supra, did the government finally admit surveillance.

Likewise, in United States v. Hoffa, 307 F.Supp. 1129 (1970), the Solicitor General admitted surveillance in the brief filed with the Supreme Court. Case after case repeats the litany. In United States v. Smilow, 472 F.2d 1193 (2nd Cir. 1973), this Court scored the irresponsibility of the United States Attorney in making incomplete and inaccurate representations which were not cured until the case reached the Supreme Court. See also, In re Norman, 486 F.2d 926 (7th Cir. 1973).

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<sup>\*/</sup> Late admissions and remands in the Supreme Court have also occurred in the following cases: United States v. Korman, 93 S.Ct. 93 (1972) (grand jury witness) (reversed on other grounds); Smilow v. United States, 409 U.S. 944 (1972) (grand jury witness); Sellers v. United States, 396 U.S. 9 (1969); Tillman v. United States, 395 U.S. 830 (1969); Balistrieri v. United States, 395 U.S. 710 (1969); Jones v. United States, 395 U.S. 462 (1969); Markis v. United States, 387 U.S. 425 (1967) (two cases); Hoffa v. United States, 387 U.S. 231 (1967); Granellow v. United States, 386 U.S. 1019 (1967) (denying certiorari); O'Brien v. United States, 386 U.S. 345 (1967); Schipani v. United States, 385 U.S. 372 (1966); Black v. United States, 385 U.S. 26 (1966); and in approximately 15 cases under the name Giordano v. United States, 394 U.S. 310 (1969). See also Gelbard v. United States, 408 U.S. 41 (1973) at 61-62 n. 2d.

Many similar late admissions have also occurred in the Court of Appeals.



There are many reasons for these inaccurate representations. First, the source of information gathered by the F.B.I. is frequently concealed even from its own agents. The use of code names such as "C" in United States v. Alderisio, 424 F.2d 20, 24, n. 6 (10th Cir. 1970), or the use of the term "confidential informant" as in United States v. Coplon, 185 F.2d 629, 639 (2nd Cir. 1950), cert. den. 342 U.S. 920 (1952) may well disguise illegal surveillance. In United States v. Schipani, 289 F.Supp 43 (E.D.N.Y. 1968), aff'd. 414 F.2d 1262 (2nd Cir. 1969), cert. den. 397 U.S. 922 (1970), for example,

... various agents ... testified that they were unaware of [electronic] surveillance .... Thus, [agent] Wilens, upon being shown an FBI report based in part upon electronic surveillance, testified that he would not be able to tell whether any particular entry in the report was derived from this method of surveillance and that he might make such information available to another agency without being aware of its source. 289 F.Supp at 50.

Accordingly, once the records suggest such an informant, only the original agent may be aware of the wiretaps and those who succeed him may remain unaware. Additionally, the records may not reflect surveillance because it is not uncommon for agents to listen to tapes from which they gain investigative leads and then erase them. Thus, unless a hearing were held, no information would be forthcoming from the files alone.

Even where searches of the files for electronic surveillance are conducted, the government's filing and record-



keeping system for electronic surveillance is so haphazard and irrational that a thorough search for surveillance records is impossible, and a denial of electronic surveillance, even if made in good faith, may be erroneous. <sup>\*/</sup>

\*/ A recent government affidavit states:

.... the electronic surveillance indices of the Federal Bureau of Investigation list only the names of persons who were overheard or against whom an electronic surveillance was directed. Thus, if an individual placed a call from a telephone which was the subject of such surveillance, unless the individual placing the call identified himself by name or disclosed the telephone number of the telephone used by him, there would be no record of the caller by name in the electronic surveillance indices or any record in the files of the Federal Bureau of Investigation of the telephone number used by him. In instances where there has been a monitoring of a conversation with the consent of one of the parties thereto, the fact of overhearing would not be listed in the electronic surveillance indices of the Federal Bureau of Investigation.

Affidavit of John H. Davitt, ¶6, Kinoy v. Mitchell, No. 70 Civ. 5698 (RJW) (S.D.N.Y.). The government is now admitting this shortcoming in its retrieval system because of testimony elicited from F.B.I. agents in the taint hearing in United States v. Ahmad, Crim. No. 14950 (M.D.Pa. 1971). That testimony also revealed that the government has no other index than the one mentioned in the affidavit quoted above; that the index does not include surveillance by any agency other than the F.B.I.; that the Justice Department has no other method for determining whether an individual has been the subject of surveillance (other than contacting each agency or F.B.I. field office); that the index does not list surveillance by address, telephone number, or case; that the index therefore does not list surveillance conducted on pay telephones unless the full name of the user is known; that the index further does not reflect overhearings of persons who identify themselves by first name or nickname only, unless the agent listening knows the identity of the person and so indicates in the files; that otherwise no voice identifications are made or reflected in the index; and that where surveillance is conducted of a telephone at a house in which several people are living, the index lists only the name of the subscriber and not other residents or guests, unless they are identified by full name in the course of an overheard conversation. Transcript of testimony of Special Agents Gary Owen Watt and Mason Smith, May 2, 1972, at 4-77, United States v. Ahmad, supra; cf. United States v. Smilow, supra. Thus, at least where the government concedes that its records reflect some unidentified voices in the overheard conversations, it cannot truthfully deny that the witness was overheard.



Since the Supreme Court has assumed that in the absence of a complete denial, a party's allegation of surveillance is true, Gelbard v. United States, supra at 46-47, this Court is required to order an evidentiary hearing on the adequacy of those denials, if and when made, which are incomplete. As to the allegations which are not controverted and therefore admitted, disclosure and a hearing under Alderman is compelled and the District Court's failure to order one constituted error.

An evidentiary hearing on the adequacy of incomplete responses is necessary to explore whether the individuals, telephone numbers and dates specified in the appendix are the basis of the search, whether agency files were searched, the individuals who conducted the search and the scope of each agency's search. Thus, the government's responses if not adequate to resolve the panoply of electronic surveillance issues presented herein, must be subject to a full evidentiary hearing.

POINT IV

THE COURT BELOW ERRED IN NOT HOLDING A  
HEARING TO DETERMINE WHETHER THE SUBPOENA  
DUCES TECUM SERVED UPON BISHOP MILTON L.  
WOOD VIOLATED APPELLANTS' FOURTH AMEND-  
MENT RIGHTS AND THEREBY TAINTED THE  
GRAND JURY PROCEEDINGS

On November 24, 1976, a subpoena duces tecum was served upon Bishop Milton L. Wood, asking for, among other materials:

Any and all records, documents, and files within your care, custody, control or possession, relating to Maria Cueto and Raisa Nemikin, including personnel files;

The subpoena duces tecum was, in fact, a search warrant directed against Ms. Cueto and Ms. Nemikin, without affording them notice. The personal property of both appellants that they kept at their offices at the Episcopal Church Center, 815 Second Avenue, New York, New York would be subject to the subpoena duces tecum.

In the form of a subpoena, materials were gathered without the control of judicial inquiry as to the probable cause or scope of the search or as to the preservation of constitutional rights as guaranteed by First and Fourth Amendments, which are critical in the instant case.

In United States v. Calandra, 414 U.S. 338 (1974), the Supreme Court held that illegally obtained evidence can be considered by a grand jury. In that case, evidence illegally seized by federal agents through an improper use of a search warrant was turned over to the grand jury. The Court still allowed the grand jury to consider the evidence on the grounds that the illegality did not involve the grand jury and consequently the broad powers of the grand jury should not be



hindered:

The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasions of these areas of an individual's life. That wrong, committed in this case, is fully accomplished by the original search without probable cause. Grand jury questions based on evidence obtained thereby involve no independent governmental invasion of one's person, house, papers, or effects, but rather the usual abridgment of personal privacy common to all grand jury questioning. Questions based on illegally obtained evidence are only a derivative use of the product of a past unlawful search and seizure. They work no new Fourth Amendment wrong. Whether such derivative use of illegally obtained evidence by a grand jury should be proscribed presents a question, not of rights, but of remedies.

At p. 355. (Emphasis supplied)

In the instant case, the illegality was committed by the grand jury itself rather than by another agency which then turned over the "fruits" of the illegal search to the grand jury, and therefore the question herein is one of rights rather than of remedies. It is clear that the Fourth Amendment applies to grand jury proceedings, U.S. v. Calandra, *supra*, U.S. v. Dionisio, 410 U.S. 1 (1973); U.S. v. Mara, 410 U.S. 19, (1973); In re Grand Jury Proceedings, 486 F.2d 85 (3rd Cir., 1973); U.S. v. Doe (Schwartz), 457 F. 2d 895 (2nd Cir., 1972).

The clear intent of Calandra was not to permit the grand jury to violate constitutional rights and privileges but rather to insure the smooth functioning of the grand jury where another agency had previously committed an illegality. To allow the government to then use the grand jury to subvert the constitutional protections afforded by the Fourth Amendment



by broadening the Calandra rationale to abrogate all Fourth Amendment rights is a flagrant abuse and misuse of the grand jury process. In re Nwamu, No. M11-118 (S.D.N.Y., McMahon, J., November 9, 1976)

Judge Pierce, in his decision of appellants' motions to quash and suppress, denied appellants' suppression motion on the grounds that the subpoena duces tecum had been complied with and thus the issue was moot. Clearly, a motion to quash a subpoena that has been complied with is moot. However, the suppression issue is a live one.

Ms. Cueto and Ms. Nemikin assert that the evidence obtained by a subpoena duces tecum served in violation of the Fourth Amendment has tainted both the subpoenas served upon them and the questions propounded to them in the grand jury especially since the Government has stated that these illegally seized files were the basis for the questions propounded to appellants. It is clear, then, that appellants, before being held in contempt, had a right to an evidentiary hearing to determine whether this violation of their Fourth Amendment rights tainted the grand jury proceedings and gave them "just cause" to refuse to answer the questions propounded to them.



CONCLUSION

FOR THE ABOVE-STATED REASONS  
THIS APPEAL SHOULD BE GRANTED  
AND THE JUDGMENT HOLDING APPELL-  
LANTS IN CIVIL CONTEMPT PURSU-  
ANT TO 18 U.S.C. §1826 (a)  
SHOULD BE REVERSED.

Respectfully submitted,

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T.D.